

**DECISION**



14877 *Kutger*  
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**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

*[Protest of Nonresponsibility Determination]*

FILE: B-198923

DATE: September 11, 1980

MATTER OF: Reuben Garment International Co., Inc.

**DIGEST:**

1. Where contracting officer, following determination that bidder is non-responsible and SBA declination to issue COC, reconsiders nonresponsibility determination in light of new information presented by bidder and determines that bidder remains nonresponsible, there is no legal obligation to request SBA reconsideration.
2. Bidder's allegation of unfair treatment is unfounded where bidder failed to inform agency during second preaward survey, prompted by bidder's request following denial of COC by SBA, of unspecified new evidence bearing upon responsibility.

Reuben Garment International Co., Inc. (Reuben), protests the award of a contract to Pamlico Canvas Products, Inc. (Pamlico), under invitation for bids (IFB) No. DLA100-80-B-0275 which was issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania.

DPSC issued the IFB for tents as a combined Small Business/Labor Surplus Area (LSA) set-aside with a "formal" portion (for small businesses) of 1,500 units and an LSA portion of 1,500 units. Reuben, which is a small business and an LSA firm, submitted the low bid on the formal portion. A preaward survey by the Defense Contract Administration Service (DCAS) assessed Reuben's "production capability," "plant facilities and equipment," "labor resource," "performance record," and "ability to meet required schedule" as unsatisfactory and recommended

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that no award be made to Reuben. The contracting officer therefore determined that Reuben was a nonresponsible bidder. By letter of February 14, 1980, the contracting officer referred the issue of responsibility to the Small Business Administration (SBA) for consideration under certificate of competency (COC) procedures. SBA, by letter of March 18, 1980, declined to issue a COC. This determination was applicable to both the formal and LSA portions of the solicitation. On April 25, 1980, DPSC awarded the formal portion of the IFB to Pamlico.

As to the LSA portion of the IFB, Reuben, by letter of March 20, 1980, requested that DPSC authorize SBA to perform a resurvey, enumerating various ways in which it had improved its production capabilities since the initial survey was conducted. The new information Reuben supplied included, among other things, the purchase of new machinery, the hiring of a new assistant manager, and the addition of a night shift. DPSC responded, by letter of March 25, 1980, that if Reuben offered on the LSA portion, DPSC would authorize another preaward survey by DCAS.

Based upon the new information submitted by Reuben, the second preaward survey found that Reuben's "plant facilities and equipment" and "labor resource" ratings were now satisfactory; however, it determined that "production capability," "performance record," and "ability to meet required schedule" remained unsatisfactory and raised doubts as to the firm's "financial capability." The resurvey recommended no award. The contracting officer again determined that Reuben was nonresponsible and, after securing from SBA a confirmation that the March 18, 1980, declination to issue a COC applied to both the formal and LSA portions, rejected Reuben's offer. The contracting officer made no subsequent referral to SBA. The LSA set-aside was eventually awarded to Pamlico.

Essentially, Reuben contends that DPSC violated Defense Acquisition Regulation (DAR) § 1-705.4 (1976 ed.) by failing to refer the issue of nonresponsibility to the SBA following Reuben's submission of new information and the contracting officer's second determination of nonresponsibility. We disagree.

No small business may be precluded from award because of nonresponsibility without referral of the matter to the SBA for a final disposition. DAR § 1-705.4 (1976 ed.); J. L. Butler, B-194932, December 18, 1979, 79-2 CPD 412. Here, the matter was so referred, and SBA declined to issue a COC on both the formal and LSA portions of the IFB. Denial by the SBA of a request for a COC constitutes an affirmation of the contracting officer's determination of nonresponsibility. Air-O-Plastic Corporation, B-189932, September 15, 1977, 77-2 CPD 194. It is well settled, however, that responsibility determinations should be based upon information indicative of the bidder's position as close as possible to the date of award. Harper Enterprises, 53 Comp. Gen. 496 (1974), 74-1 CPD 31. Therefore, we do not treat the denial of a COC as dispositive where, during the period between the COC denial and contract award, information probative of the bidder's responsibility comes to light for the first time. Precision Electronics Labs, B-186751, October 29, 1976, 76-2 CPD 369. Even in those cases, however, we have limited our review to recommending that the agency reassess the bidder's responsibility where such newly available information has not been considered. Inflated Products Company, Incorporated, B-188319, May 25, 1977, 77-1 CPD 365.

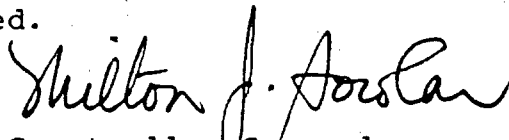
Here, DPSC has reassessed and resurveyed the bidder's responsibility in light of newly presented information and has determined that the information did not substantially alter the initial nonresponsibility determination. Under these circumstances, DPSC is not legally obligated to request reconsideration by the SBA. See Kent Uniform Company, Inc., B-188931, July 25, 1977, 77-2 CPD 46; West Electronics, Inc., B-190173, February 10, 1978, 78-1 CPD 118.

Reuben also argues that it did not come forward with certain unspecified new evidence regarding its production and financial capabilities because it was relying on an April 3, 1980, letter from DPSC. This letter, Reuben claims, stated that Reuben would be allowed to proffer further evidence to the SBA prior to award of the LSA portion.

This assertion, which implies that Reuben was unfairly precluded from submitting relevant information, is unsupported by the record. Reuben participated in the initial preaward survey and SBA proceeding. Following denial of the COC by SBA, Reuben, by its March 20, 1980, letter to DPSC, requested a resurvey by SBA detailing alleged improvements on its part. The letter of April 3 stated only that DPSC would "authorize another preaward survey by DCAS" (emphasis supplied) and made no mention of SBA referral. Subsequently, Reuben participated in the second preaward survey. We see no basis upon which Reuben could reasonably have withheld information from agency evaluators which favorably affected the responsibility determination. In any event, although the determination of nonresponsibility should be made on the basis of information made available as close to the contract award as practicable, we will not require an agency to withhold award indefinitely merely because a bidder may possibly come forward with new information at some time in the future. See Inflated Products Company, Incorporated, supra.

Finally, Reuben disputes the nonresponsibility determination by arguing that consideration of Reuben's delinquency in two Government contracts (which were eventually terminated for default by the Government) was incorrect because Government actions violative of the terms of those contracts contributed to the delinquency. As we indicated above, the SBA's declination to issue a COC constitutes an affirmation of the contracting officer's determination of nonresponsibility. United States Crane Certification Bureau, Inc., B-188856, July 22, 1977, 77-2 CPD 43. Therefore, that determination must be considered conclusive and will not be reviewed by our Office absent, as here, bad faith or fraud. Kent Uniform Company, Inc., supra.

The protest is denied.



For the Comptroller General  
of the United States